Introduction

The intention of the proposal is to strengthen the deterrent and punitive effect of penalties for corporate crime by allowing courts to obtain pre-sentence company background inquiry reports into the financial circumstances of companies and to impose equity fines. The consultation document accompanying the draft proposal for the Criminal Sentencing (Equity Fines) Bill was issued on 28 July 2008 and formally ran until 1 December 2008, although several late submissions were accepted.

The consultation document was issued to various organisations and individuals with an interest in the issue. It was also made available from a link...

**General**

In total, twelve responses were received. Three responses were from individuals and the rest from organisations. One of the organisational responses was submitted anonymously by a major bank. It was accompanied by a statement to the effect that “the entire response is submitted in confidence and no part of it is to be made public” so further details cannot be given.

The nine organisations submitting responses could be classified as trade union-related (the Fire Brigades Union Scotland, the Scottish Trades Union Congress and UNISON), campaigning organisations (the Centre for Corporate Accountability, Families Against Corporate Killers and the Hazards Campaign), representative of business (CBI Scotland) and representative of the UK Government (the Health and Safety Executive).

Of the individual responses, one came from a Labour MSP, one was submitted jointly by two academics with expertise in the relevant area of law and one was submitted anonymously.

Of the twelve responses, only two expressed opposition to the proposal.

Responses could be divided into four categories on the basis of their content: those that were positive, those that were supportive of some elements of the Bill, those that were unsupportive of the proposal and those that did not express a view.

**Positive responses**

Positive responses were received from the anonymous individual, all the campaigning organisations and the Fire Brigades Union Scotland. The latter specifically commented that it did not think the equity fines would be a deterrent to investment in Scotland, nor would they fall under reserved legislation.

**Mixed responses**

The second category of responses - drawn from the STUC, Dr Croall and Ms Ross, and Patricia Ferguson MSP – all believed that present legislation was inadequate and all were in favour of company background inquiry reports, but raised several concerns regarding the introduction of equity fines by the Scottish Parliament, including that they would lie outwith the competence of the Scottish Parliament and that they would only apply to Public Limited Companies. A broader package of measures would be supported by these respondents, but this would be beyond the scope of a Member’s Bill. However, Ms Ferguson made the interesting suggestion that the Courts be
given an additional power that would allow them to be able to order recovery of various costs that may have been incurred by the Crown, police or other statutory body in relation to the prosecution.

**Unsupportive responses**

Unsupportive responses were received from CBI Scotland and UNISON. The former believes that the UK Government’s Corporate Homicide Act should be given time to work and that the proposed Bill would lie outwith the competence of the Scottish Parliament. The latter also believes that the Bill would prove incompetent and is concerned about the impact of equity fines on the small shareholder, employee-shareholder and pension funds but is of the opinion that present legislation is inadequate.

Finally, the Health and Safety Executive did not express a view on the proposal.

**Specific Aspects of the Bill**

**Company Background Reports**

All responses either made no reference to company background reports or expressed unequivocal support for this proposal. With Scottish Government support, the Member intends lodging this proposal as an amendment to the Criminal Justice and Licensing (Scotland) Bill.

**Equity Fines**

Broadly the responses to the proposal to introduce equity fines fell into three categories:

- **Opposed**: CBI, Unison
- **Neutral**: Patricia Fergusson MSP
- **Supportive**: FBU, STUC, Centre for Corporate Accountability, Families against Corporate Killers, Hazards Campaign, Hazel Croall and Jennifer Ross, one anonymous response.

The main concerns expressed regarding the introduction of equity fines were:

- The system may prove complex in legislative terms

This is certainly possible, but, until attempted, is difficult to assess.

- The introduction of equity fines legislation is a reserved matter
This is not an argument against equity fines *per se*, but a comment on whether or not the Scottish parliament has the authority to introduce them. As noted in the consultation, there is extensive argument to suggest that sentencing is entirely a devolved matter.

- That small stakeholders might be unfairly affected by their introduction.

Although the fear was expressed that small shareholders would be unfairly affected by their introduction, it is likely that the existence of equity fines as potential penalties would have a deterrent effect on companies seeking to put profit before compliance with the law (a fact mentioned in several of the responses). If this were the case then it is hard to see how there would be a major significant detrimental effect on such shareholders, and employee-shareholders would presumably benefit inasmuch as such compliance improved the conditions and health and safety aspects of their employment.

- That pension funds might be significantly adversely affected

No evidence was presented to demonstrate how this might happen. The fear that equity fines would significantly affect pension funds assumes that any one fund would have a large proportion of its investments tied up in a company likely to be the recipient of an equity fine, a prospect that seems unlikely (barring poor investment practice on the part of the pension company).

- That equity fines would be better introduced as a part of a package of new sentencing options and that only a limited number of companies would be directly affected by equity fines

The main reasons for supporting equity fines were:

- Present monetary fines are too low

Subsequent to the publication of the consultation document additional figures have become available. Although hard to interpret as the offences are not detailed, these recent figures (on the HSE website) give little cause for comfort as average penalties per conviction for cases in which HSE and local authorities took action have declined over the last three years for which data are available, to £15,071 for 07/08 for HSE-led cases and £5,756 for 07/08 for local authority-led cases.

- Equity fines target those responsible for corporations’ policies
- Equity fines target those who profit from corporate crime
- Equity fines will deter investors from financial commitment to companies with poor health and safety records

The Member believes that while many of the respondents presented both positives and negatives, there was overwhelming agreement that the present
system is inadequate and that the sentencing of those convicted of corporate crime needs reform. He notes the clear inadequacy of financial penalties, and believes that is improbable that such penalties alone would ever act as a significant deterrent for major corporate crimes such as the Exxon Valdez disaster, and that alternatives are required. He accepts that the detention of company directors would be desirable but the implementation of such legislation lies outwith the powers of the Scottish Parliament.

The Member believes that while there are clear potential benefits to equity fines, almost all the objections were not backed by evidence-based argument. The most credible objection seemed to be that equity fines would impinge on reserved matters. The Member is of the opinion, however, that the arguments he presented in the consultation document have sufficient merit for the legal feasibility of equity fines to be properly tested, and so will be proposing this element as a standalone Bill.

**Conclusion**

The Member thanks all the respondents for their interest in his proposal and their submissions.
Appendix: Summary of each response

A. Organisations

CBI Scotland

CBI Scotland believes that penalties in this area will impact on Company Law and therefore do not lie within the competence of the Scottish Parliament. They also believe that Westminster’s new Corporate Homicide Act will make it easier to prosecute organisations for work-related deaths, that it brings in limitless fines and that it has the potential for huge reputational damage for employers held accountable for work-related deaths and therefore that it should be given “time to work” and reviewed after several years. CBI Scotland does not support the proposed Bill and suggests that if it is brought forward a full Business Impact Assessment ought to be published at the very earliest stages.

Fire Brigades Union Scotland

Statement of support

This makes no mention of the company background inquiry reports but is strongly supportive of the idea of equity fines. It states that the current situation in unacceptable and that equity fines would be unlikely to affect the viability of businesses but would act as a much more effective deterrent to health and safety offences than conventional fines, and should be applied to as wide a range of offences as possible. Shareholders, FBU Scotland believes, would be much more likely to hold companies to account. FBU Scotland does not believe that equity fines would act as an obstacle to businesses wishing to set up or trade in Scotland and neither does it believe that they would impact on reserved legislation.

Formal response

This opens with a description of the intrinsically socially irresponsible nature of corporations which, FBU Scotland states, are entities driven by customers who are largely interested in costs, and by investors who are largely interested in profits, and the problems this situation poses for legislators. It argues that the only effective way of targeting a corporation is by attacking its profits and that, because efficient companies have low cash reserves, basing fines on these is a fundamentally flawed approach. Equity fines, FBU Scotland believes, are one of the few appropriate punishments as they will target those responsible for a corporation’s policies and deter investors from companies with poor records in health and safety, for example, and so force improvements.

Health and Safety Executive
A short, informal and neutral response stated that in 2005/6 the HSE considered the impact of introducing alternative penalties for health and safety offences, and that equity fines were mentioned. Responses to the HSE consultation suggested there was broad support for exploring alternative penalties further but that there was no specific reference to equity fines. Like the other organisations that responded to the present consultation, with the notable exception of the STUC, HSE did not refer to the proposed company background inquiry reports.

The Scottish Trades Union Congress (STUC)

The STUC “believes that fines imposed by Courts, especially in relation to breaches of health and safety legislation, neither reflect the seriousness of the failures nor the impact that company failures have on injured workers and family members who lose loved ones in work related tragedies”. It supports the idea of equity fines as part of a suite of penalties and suggests that they should apply to all offences but is concerned that they would only apply to Public Limited Companies, that “there may be a detrimental effect on smaller shareholders who have no say in directing corporate activity” and that the Scottish Judiciary would not be allowed to instruct the issue of shares under the existing Articles of Association (i.e. that it would require legislative changes reserved to Westminster). The STUC strongly and unequivocally supports the introduction of company background inquiry reports.

UNISON

UNISON is unhappy with the present penalties imposed upon companies found guilty of offences that result in death or injury and believes that they need improvement, but has reservations about equity fines, believing that their implementation would require powers reserved to Westminster, that they might only be applicable to companies registered in Scotland, that they would unfairly penalise small shareholders and employee-shareholders and not specifically target those responsible for company policy, and that they would threaten pension schemes. UNISON would like to see “other methods of punishment of companies being considered, and [has] supported measures such as corporate probation and publicity orders”. UNISON’s submission made no mention of company background inquiry reports.

The three statements of support from campaigning organisations are reproduced in full as they are so short:

Centre for Corporate Accountability

Bill Wilson’s proposal to introduce equity fines is important because it seeks improved accountability of those that profit most from safety crimes.
Families Against Corporate Killers

Very often it is workers or members of the public that bear the costs of fines for corporate manslaughter and homicide. Those proposals begin to challenge this gross injustice.

Hazards Campaign

The Hazards Campaign fully supports these proposals for equity fines as an innovative and effective way of ensuring that companies rather than their workers are punished for committing serious crimes.

B. Individuals

Anonymous

This response was unequivocally in favour of the idea of equity fines. This individual believes that they should be applied to all offences but particularly those involving health and safety, and expresses only the minor concern that they might affect the level of compensation that survivors or the relatives of someone who died due to the unlawful actions of a company would receive.

Patricia Ferguson MSP

Ms Ferguson deplores the current situation with regard to the prosecution, conviction and punishment of corporate offenders but does not believe that the proposed bill correctly targets the main area of concern (i.e. cases involving the loss of life or serious injury), stating, “Most prosecutions in these cases are not [under] common law but are brought under statutory legislation – the Factories Acts; the Health and Safety Act or in future would be brought under the new Corporate Homicide Act and as such are specifically excluded from the terms of this Bill.” She also believes that the exclusion of private companies detracts from the proposed Bill’s usefulness, that equity fines might only be applicable to companies registered in Scotland and that they would affect reserved issues, particularly the Companies Act, although she does think they merit further investigation and could perhaps be brought forward as a part of [UK?] government legislation. She supports the idea of company background inquiry reports with regard to private companies but believes that “due to current reporting and accounting requirements laid down by the Companies Act [public companies] actually have much more transparent financial disclosure current“. She agrees with the suggestion in Clause (4) of Part 1 of the Bill that there be an additional power to charge the cost of the report to the convicted company and additionally suggests that the Courts be given an additional power that would allow them to be able to order recovery of other costs that may have been incurred by the Crown, police or other statutory body in relation to the prosecution.
Dr Hazel Croall (Senior Lecturer in Sociology at Strathclyde University) and Ms Jenifer Ross (Senior Lecturer at the University of Strathclyde Law School)

Dr Croall and Ms Ross think that the main effect of equity fines on companies might be deterrent and that additional measures might be required for monitoring, rehabilitation and ensuring future compliance. They believe they if feasible they should be available for a broad spectrum of offences, although they can also see merit in the argument that they be reserved for more serious offences.

They wholeheartedly support the introduction of Company Background Inquiry Reports and feel that this is an important free-standing proposal which should be pursued irrespective of the other content of the Bill.

As the proposed Bill is limited by applying to public companies only they think it would be desirable to consider other options for other organisations. A major issue in respect of these organisations, they point out, is the ‘deterrence trap’ in which too high a fine can have adverse effects on the survival of the business. They suggest that other forms of punishment be considered, such as fines based on profit and/or turnover.

While they believe that any potential interference with the right to peaceful possession of property should be justifiable in the public interest, they also contend that the potential impact of equity fines on worker shareholders, and small shareholders, requires further consideration.

Dr Croall and Ms Ross support the introduction of equity fines in principle, on the grounds that, as stated in the consultation document, they enable the imposition of larger fines and avoid some of the limitations often described as the ‘deterrence trap’ in that heavy monetary penalties may force a company to cease its operations or otherwise have with a spill-over effect on workers, consumers and local communities. They believe they can be a powerful tool in any sentencing package.

At the same time, they state that a number of matters require consideration:

   Equity fines may be difficult to administer and implement. The mechanism used in the Bill is over-simplified and would require more complex administration mechanism in order to be able to operate satisfactorily and attain the desired effects.

The proposals have an impact on matters which are reserved.

Legislation which modifies Scots criminal law as it relates to reserved matters, but would not otherwise relate to reserved matters, would normally be treated as relating to reserved matters (and thus outside the competence of the Scottish Parliament) unless the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise. It would be
necessary, accordingly for there to be a similar provision to be included in any Bill to that in the Criminal Proceedings etc. (Reform) (Scotland) 2007 which was in the legislation extending the powers of the sheriff to all crimes, to ensure its application consistently to all crime, common law and statutory. Without such detail it would not so extend.

A second intrusion into reserved matters is in relation to company law. Company law and the Companies Act 2006 in particular are reserved. The Companies Act makes provision in relation to the issuing of shares. If it were to be argued that the consistency exception contained in s.29(4) of the Scotland Act were to apply here as above, it would be necessary to contain a specific amendment of the provisions of the Companies Act in order to compel the issuing of shares by court order. Secondly, the intrusion into reserved matters is greater here than in the case of the Criminal Proceedings etc (Reform) (Scotland) Act 2007, and it is unlikely that the exception to s.29(4) would apply in this case.

It does not specify where the sums obtained from the fines would go. These could be used to provide some form of compensation to those, mainly workers or consumers, adversely affected.

There is a danger that the problems identified would hamper the introduction and operation of Equity Fines. As Scotland would be first country to introduce this measure, and would inevitably attract international attention, it would be unfortunate if its operation were to be limited by the restrictions which this imposes.

It may be easier, and apply to a wider number of organisations, to consider a wider package of sentencing reform, which would not require encroachment into the Companies Acts. These could include a range of non-monetary sentences tailored to the company, as well as the traditional fine itself. It would be possible to have a more rigorous approach to corporate fines, through, for example, turnover or profit, without going beyond Scottish Parliamentary competence.

Taken by themselves, Equity Fines do not overcome all of the problems associated with the use of monetary penalties within current sentencing policy. The aim of the Company Background Inquiry Reports, proposed in the Bill, is to establish deficiencies in internal procedures which contribute to the lack of compliance. These can be the specific target of other forms of sentence, such as Corporate Probation or Remedial Orders which may be more appropriate in some cases and which can be imposed in addition to any Fine.

A further range of alternative penalties was supported by the Scottish Expert group and in England and Wales, an extensive report recommended a range of alternative penalties for less serious regulatory offences. The administrative, but not the criminal, elements of these are contained in the Regulatory Enforcement and Sanctions Act of 2008, but their application to
Scotland, or the implementation of the criminal penalties, has received little public consideration. We would argue that Equity Fines should be considered as part of a package.

The issue of sentencing companies convicted of all criminal offences should be further considered, either by a re-constituted Expert Group similar to the one which reviewed Corporate Homicide legislation, or by the reconvened Scottish Sentencing Commission. There is a gap as the proposals of the English Sentencing Advisory Panel do not cover Scotland and the proposals of the MacRory report have not been fully discussed in Scotland. This could also consider other limitations such as the situation as regards private companies like Stockline or public organizations convicted of criminal offences. Scotland has an opportunity to take a lead in respect of sentencing the corporate offender.

**Overall summary of Dr Croall and Ms Ross’s response**

Dr Croall and Ms Ross unequivocally support the idea of company background inquiry reports but believe that equity fines are likely to be ruled out with the competence of the Scottish Parliament and should only be considered as part of a wider package of measures to apply to a wider range of organisations than simply Public Limited Companies.